

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRI HODGKINS

Claimant

VS.

DILLON COMPANIES, INC.

Respondent

Self-Insured

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Docket No. 193,072

ORDER

Respondent appeals from an Award rendered by Administrative Law Judge George R. Robertson on May 26, 1995. Oral argument was presented to the Appeals Board on September 20, 1995.

APPEARANCES

The claimant appeared by and through her attorney, Alan C. Goering of Medicine Lodge, Kansas. The respondent, a qualified self-insured, appeared by its attorney Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the May 26, 1995 Award.

ISSUES

The sole issue presented to the Appeals Board for review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and considered the arguments of the parties, the Appeals Board finds claimant is entitled to benefits based upon a sixteen percent (16%) general work disability.

The Administrative Law Judge made extensive findings of fact and conclusions of law in his Award. It is not necessary to repeat those herein. The Appeals Board adopts the findings of fact and conclusions of law contained in the Award of the Administrative Law Judge to the extent they are not inconsistent with the expressed rulings made herein. The Appeals Board finds that the claimant has overcome the presumption of no work disability as contained in K.S.A. 1992 Supp. 44-510e. Following her release to return to work with restrictions by Dr. Robert Eyster, the claimant was advised by respondent that it could not or would not accommodate her restrictions. Claimant found herself looking for work in the open labor market with limited education, training or transferable skills. She was hindered in her job search by physical limitations which restricted her to the light category of work and, at least in her mind, to working not more than thirty (30) hours per week. After a period of approximately ten (10) months, claimant was able to secure employment which afforded her the opportunity to earn a wage comparable to that which she was earning with the respondent. K.S.A. 1992 Supp. 44-510e(a) provides in pertinent part that:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e can be rebutted under circumstances where the evidence is found to support an award of work disability. Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993).

The evidence in this case establishes that the claimant has sustained a work disability in excess of her functional impairment. Before her work-related injury which is the subject of this claim, she had no physical restrictions or limitations. She is now limited to light duty work. The respondent declined to accommodate her restrictions but nonetheless seeks to receive the benefit of the presumption created by claimant's perseverance in finding other employment within her restrictions. That employment, although only part time, nonetheless is sufficient to give rise to the presumption due to the claimant's low hourly wage and part-time status with the respondent. Claimant testified that although there is work available for her to work thirty (30) hours a week and she has in fact worked enough hours to earn a comparable wage to that which she was earning with respondent, it causes her increased symptomatology when she works in excess of fifteen (15) hours per week. Nevertheless, there are no medical restrictions in evidence keeping her from working sufficient hours to earn a comparable wage.

The only vocational expert that offered an opinion in this case as to the extent to which claimant's injury has reduced the claimant's ability to perform work in the open labor market and to earn comparable wages was Mr. James Molski. He testified that in his opinion the claimant is able to earn between minimum wage and \$5.00 per hour postinjury for a zero to seven percent (0-7%) loss of ability to earn a comparable wage. He further testified that it is reasonable to expect that the claimant can find work in the open labor market comparable to the \$4.45 per hour she was earning at the time of her injury. Accordingly, the Appeals Board finds from the evidence both as to claimant's ability and from her actual postinjury earnings that she has not suffered a wage loss. This prong of the two-part test is zero percent (0%).

Mr. Molski also offered opinions concerning the extent to which claimant has lost the ability to access the open labor market as a result of her work-related injury and the

resulting restrictions. However, the opinions given by Mr. Molski are based upon restrictions imposed by Dr. Eyster and Dr. Friesen. The depositions of Dr. Eyster and Dr. Friesen were not taken in this case. Their opinions were not otherwise made a part of the record. Respondent made a timely objection to the opinion testimony of Mr. Molski being based upon facts not in evidence. Accordingly, the Appeals Board disagrees with the ruling by the Administrative Law Judge to accept this opinion testimony and overrule the objection of respondent. The Appeals Board finds that the opinions given by Mr. Molski as to labor market loss to the extent they rely upon restrictions given by physicians whose opinions are not in evidence should be excluded. However, claimant did obtain the testimony of Dr. Jeanette Salone. The permanent restrictions she recommended are essentially the same as those recommended by Dr. Eyster to the extent that they limit claimant to the light-duty work category as defined by the *Dictionary of Occupational Titles*. Mr. Molski's opinions as to labor market loss utilizing the restrictions of Dr. Eyster likewise place claimant in the light duty category. The Appeals Board finds that the opinion of Mr. Molski as to claimant's labor market loss which he attributes to Dr. Eyster's light-duty restriction is supported by the medical evidence contained in the deposition of Dr. Salone and, accordingly, the Appeals Board finds this to be competent evidence and adopts same as its finding of claimant's loss of labor market access. When comparing the labor market loss of thirty to thirty-five percent (30-35%) with the wage loss of zero percent (0%) and averaging the two prongs as approved in the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) results in a work disability of sixteen percent (16%).

Respondent objects to the second deposition of Dr. Salone in which she gives her opinion concerning permanent restrictions on the basis that the functional capacities examination report was not provided within fifteen (15) days as required by K.S.A. 44-515. The FCE report appears as Exhibit No. 2 to the March 15, 1995 deposition of Jeanette Salone, M.D. The date of that examination is shown as February 28, 1995 and the date of the report is March 7, 1995. Dr. Salone, without again examining claimant, issued a report dated March 8, 1995 which is deposition Exhibit No. 3. That report includes her recommendations for permanent restrictions consistent with the testimony given at her March 15, 1995 deposition. The record does show that the March 7, 1995 and the March 8, 1995 reports were not provided to counsel for respondent prior to the day that the March 15, 1995 deposition was taken. Respondent did not request that the deposition be continued or postponed in order to give respondent's counsel time to review the reports and prepare for cross-examination. Instead, respondent relied solely on the prohibitions of K.S.A. 44-515 which provide:

"The employer or the insurance carrier of the employer of any employee making claim for compensation under the workers compensation act shall be entitled to a copy of the report of any health care provider who has examined or treated the employee in regard to such claim upon written request to the employee or the employee's attorney within 15 days after such examination or treatment, which report shall be identical to the report submitted to the employee or the employee's attorney."

The record does not establish that a request was made to the employee's attorney for said reports. To the contrary, respondent's counsel was not aware that the FCE had taken place or that reports had been issued until the day of the deposition. Regardless of the necessity to make a demand for such reports under the circumstances, the evidence shows that the deposition itself was taken exactly fifteen (15) days following the date of the examination. Hence, claimant was in compliance with the strictures of K.S.A. 44-515.

Respondent's objection to the admission of Dr. Salone's testimony on that basis is overruled.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson date May 26, 1995 should be and hereby is modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of the claimant, Terri Hodgkins, and against the respondent, Dillon Companies, Inc., a qualified self-insured.

The claimant is entitled to 14.57 weeks temporary total disability at the rate of \$91.78 per week or \$1,337.23 and 24 weeks of temporary partial disability in the amount of \$1,170.12, which is the equivalent of 12.75 weeks of temporary total disability at the rate of \$91.78 per week, followed by 387.68 weeks at the rate of \$14.68 per week or \$5,691.14 for a 16% permanent partial general body impairment of function, making a total award of \$8,198.49.

As of September 29, 1995, there is due and owing claimant 14.57 weeks of temporary total disability compensation at the rate of \$91.78 per week or \$1,337.23 and 24 weeks of temporary partial disability in the amount of \$1,170.12, which is the equivalent of 12.75 weeks of temporary total disability, followed by 117.29 weeks of permanent partial disability compensation at the rate of \$14.68 per week in the sum of \$1,721.82 for a total of \$4,229.17 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$3,969.32 is to be paid for 270.39 weeks at the rate of \$14.68 per week, until fully paid or further order of the Director.

Further award is made that claimant is entitled to medical expenses and any unauthorized medical expenses if any.

Future medical will be considered upon proper application.

The court finds attorney fee retainer is reasonable and approves such fee arrangement.

Therefore, pursuant to K.S.A. 44-536, a lien is placed against the Award in the amount of twenty-five percent (25%) in favor of Mr. Alan Goering.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

OWENS, BRAKE, COWAN & ASSOCIATES

Regular Hearing Transcript	\$175.84
Dated February 16, 1995	

COURT REPORTING SERVICE

Deposition of Dr. Jeanette Salone	\$163.85
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Dated October 17, 1994

Deposition of James Molski	\$140.90
Dated October 17, 1994	

Deposition of Dr. Jeanette Salone	\$171.60
Dated March 15, 1995	

Total	\$476.35
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IT IS SO ORDERED.

Dated this ____ day of September 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Alan C. Goering, Medicine Lodge, KS
 Scott J. Mann, Hutchinson, KS
 George R. Robertson, Administrative Law Judge
 Philip S. Harness, Director